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In The

SUPREME COURT of the UNITED STATES

October Term, 1966

No. 659

STATE OF WISCONSIN,

Petitioner,

v.

MILWAUKEE BRAVES, INC., et al.,

Respondents.

PETITION FOR REHEARING

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PETITION FOR REHEARING

The State of Wisconsin prays that this Court grant rehearing of its order of December 12, 1966 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of Wisconsin in the above-entitled case as prayed for in the petition filed October 11, 1966. That petition sought review of a four to three decision by the Wisconsin Supreme Court that the Supremacy and and Commerce Clauses of the United States Constitution deprived the State of jurisdiction to redress respondents' violation of its antitrust laws. Petitioner respectfully prays that this Court grant rehearing for the following reasons:

1. The order denying certiorari raises an important question concerning the certiorari jurisdiction of this

Court. Certiorari was denied in this case with Justices Black, Douglas and Brennan noting their dissents. Mr. Justice Fortas did not participate in the consideration or decision of the matter. Petitioner suggests that denial of certiorari under such circumstances is contrary to the philosophy of this Court's certiorari jurisdiction and perhaps to the representations made to the Congress on behalf of this Court in 1924 when Congress was considering the Judiciary Act of 1925, 43 Stat. 936, which enlarged the Court's discretionary certiorari jurisdiction to its present scope.

Ordinarily the votes of four Justices are required for certiorari. But, as Mr. Justice Harlan, speaking for a majority of the Court, has stated in a case raising fundamental questions as to the power of the Court to dismiss a writ as improvidently granted: "the whole philosophy of the 'rule of four,' . . . is that any case warranting consideration in the opinon of such *a substantial minority* of the Court will be taken and disposed of." [Emphasis supplied.][1] In a case in which only eight Justices participate a "substantial minority" is necessarily less than four. Three is the largest minority which is mathematically possible. The "philosophy" of the "rule of four" therefore indicates that certiorari should be granted when three out of eight vote to hear the case. Furthermore, it seems appropriate to construe a "substantial minority" as equivalent to the maximum number of dissenting votes possible in a disposition on the merits having precedental effect. Where nine Justices participate, that number is four. Where eight Justices

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[1]**Rogers v. Missouri Pacific R. Co., 352 U. S. 500, 560 (1957) (Mr. Justice Harlan wrote for the Chief Justice and Justices Black, Douglas, Burton, Clark, and Brennan.) See also Id., p. 528 (Justice Frankfurther dissenting): "a minority may bring a case here for oral argument . . . ."**

participate, that number is necessarily three since a disposition by a four to four vote is no precedent. See *United States v. Pink*, 315 U. S. 203, 216 (1942); *Hertz v. Woodman*, 218 U. S. 205, 213-14 (1910). Finally, it seems generally recognized that three votes are sufficient where only seven Justices participate. This may well be the practice because in a Court of seven three is the largest possible minority and the maximum number of dissenting votes possible in a disposition on the merits. All these reasons why three is deemed a "substantial minority" of seven participating Justices obtain where the number of Justices participating is eight.

This construction of the Court's certiorari jurisdiction is corroborated by the legislative history of the Judiciary Act of 1925. The bill, known as the Judges Bill, was drafted by a committee of this Court and approved by all its members. See S. Rep. No. 362, 68th Cong., 1st Sess. (1924), p. 1; H. R. Rep. No. 1075, 68th Cong., 2d Sess. (1925), p. 2. The heart of the legislative history of that Act as it relates to certiorari jurisdiction is the testimony of Justice Van Devanter who represented the Court before the Senate and House Committees. At that time Justice Van Devanter, on behalf of the Court, advised that certiorari was granted "whenever the vote is relatively close," and that the writ was granted upon a vote of three Justices where appropriate. Petitioner respectfully suggests that this explanation of the Court's certiorari practice should be followed here. See *Rogers supra*, at 560-61.

The brief Senate Report (S. Rep. No. 362, 68th Cong., 1st Sess. (1924), p. 2) referred the Senate to the testimony of Justice Van Devanter given before the Senate

Judiciary Committee for explanation of the bill. At those hearings Justice Van Devanter made the Court's practice clear:

> "Mr. Justice Van Devanter:...The Supreme Court . . . examines the matter in the petition, record, and briefs, each member of the court making his own examination. In our conference a vote is taken on the question whether the petition shall be granted or refused . . . [W]*henever the vote is relatively close the conference makes it a practice to grant the petition.*
>
> "Mr. Justice Sutherland: Even though a majority be against it?
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> "Mr. Justice Van Devanter: Yes. For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, *and even three* in some instances, are impressed with the propriety of our taking the case, petition should be granted. This is the uniform way in which the petitions for writs of certiorari are considered." [Emphasis supplied.][2]

The House Report confirms that Justice Van Devanter's description of the Court's "substantial minority" practice in granting certiorari was a significant factor in causing the Congress to extend the Court's discretionary certiorari jurisdiction. The Report (H. R. Rep. No. 1075, 68th Cong., 2nd Sess. (1925), p. 3) states:

> "Lest it should be thought that the increase of discretionary jurisdiction might impair the administration of justice . . . it is proper to call attention to

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[2]Hearings Before a Subcommittee of the Senate Committee on the Judiciary, 68th Cong., 1st Sess., on S. 2060 and S. 2061 (1924), p. 29, H. R. 8206 and S. 2060 as introduced were versions of the same bill. S. 2060 was eventually enacted bearing the number of the House bill.

the very thorough and complete system by which discretionary jurisdiction is exercised. . . . The luminous and informing statement of Mr. Justice Van Devanter tells the whole story:

* * *

> '[All nine Justices consider each petition for certiorari]. We do not grant or deny these petitions merely according to a majority vote. We always grant the petition when as many as four think that it should be granted and sometimes when *as many as three* think that way. *We proceed upon the theory that, if that number out of the nine are impressed with thought that the case is one that ought to be heard and decided by us, the petition should be granted.'* " [Emphasis supplied.][3]

Particularly significant in this constitutional case is the fact that the House Report emphasized that extension of the discretionary certiorari jurisdiction of the Court was designed to make it possible for the Court to give full attention to federal constitutional questions. It stated (p. 2): "the court is hindered from hearing and determining more important cases [because of the number of trivial cases brought before it] and from efficiently functioning in the performance of its highest duty of interpreting the Constitution. . . ." Therefore, in a case such as the present

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[3]The quotation is from Justice Van Devanter's testimony at the House Committee Hearings. Hearings Before the House of Representatives Judiciary Committee, 68th Cong., 2nd Sess., on H. R. 8206 (1924), p. 8. At those hearings (ibid.) Justice Van Devanter also testified that "while the authority of the Supreme Court to take cases on petition for certiorari is spoken of as a discretionary jurisdiction, this does not mean that the court is authorized merely to exercise a will in the matter but rather that the petition is to be granted or denied according to a sound judicial discretion." Justice Van Devanter then went on to explain that petitions for certiorari were considered by the whole Court and that, as quoted above, the Court followed a "substantial minority" practice.

one raising important constitutional issues, it is particularly important for the Court to grant certiorari upon the vote of a "substantial minority" and thus to perform "its highest duty" for which its present certiorari jurisdiction was designed.

In light of the *Rogers* case and the legislative history of the 1925 Act petitioner respectfully suggests that the votes of three Justices in a Court of eight constitute a "substantial minority" and reveal a "relatively close" vote should result in an order granting certiorari—particularly upon the petition of a State raising important, unresolved, federal constitutional questions.[4]

Moreover, whether or not the Court agrees that the vote of three Justices should be sufficient where only eight participate, petitioner suggests that this is one of those cases in which " 'a doubting Justice' " should "respect 'the judgment of his brethren that the case does concern issues important enough for the Court's consideration and adjudication' . . ." *Rogers, supra,* at 561.

2. The circumstances of this case make it particularly appropriate for the Court to grant certiorari upon the recorded vote of three Justices.

(a) The result of a denial of certiorari in this case is that the baseball monopoly has now succeeded in establish-

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[4]Although there have been a few isolated instances in which this Court has denied certiorari by a recorded vote of five to three, in none of those cases so far as we know was it argued that certiorari should have been granted because three votes were sufficient. In Casselman v. Idaho, 338 U. S. 900 (1949) certiorari was denied by a five to three vote. The petition for rehearing, filed by Mr., later Justice, Arthur Goldberg, suggested that three votes might have been sufficient for certiorari but argued only that consideration of the case should be deferred until all nine Justices were available. Rehearing was denied, 338 U. S. 952 (1950).

ing an unprecedented and dangerous immunity from antitrust jurisdiction not enjoyed by any other American business. Its monopoly practices were first considered too local for this Court to hold that Congress intended to proscribe them in the Sherman Act. They are now held to be too interstate for constitutional regulation under state antitrust law. It is the ultimate irony here that the Commerce Clause which was intended to facilitate the free flow of goods and services has been invoked to protect a restrictive refusal to deal by an absolute private monopoly.

Even at common law abuses by monopolies were actionable. Historically, whenever monopoly power has been suffered to exist, it has been regulated either by the legislature, or, absent such regulation, by the courts. Since 1602 when the Court of King's Bench resolved that a royal grant of a monopoly for the manufacture of playing cards was void as "against the common law" and "divers Acts of Parliament," (*The Case of Monopolies*, 11 Coke 84, 77 Eng. Rep. 1260 (1602)), English and American courts have steadfastly refused to suffer private monopoly to commit abuses completely free from all sanction. This Court, in *Munn v. Illinois*, 94 U. S. 113, 134 (1876), pointed out, drawing upon the common law precedents:

> "[I]n matters [involving a private monopoly] which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable." *Id.*, at 134.

As Chief Justice Waite said for this Court, *id.*, at 125-26, a monopoly over property or a service "in which the pub-

lic has an interest . . . must submit to be controlled by the public for the public good."

The present case illustrates why monopolies should not go unregulated. Here, a monopoly has determined to boycott the entire State of Wisconsin. This Court's denial of certiorari has the effect of placing this abuse of monopoly power beyond the jurisdiction of any authority under existing law. The dangers to the public from this license are illustrated by the statements of Mr. Walter O'Malley, principal owner of the respondent Los Angeles Dodgers, appearing in the record in this case[5] and in the press after this Court's December 12, 1966 order was announced.[6] Those statements indicate that the baseball monopoly may well continue to boycott Wisconsin because public officials in Wisconsin dare express themselves critically about organized baseball and initiate litigation under laws which it is their sworn duty to enforce. This Court should not permit the federal Constitution to shield such abuse of monopoly power.

(b) The thriving condition of those professional league sports which are now subject to the antitrust laws is dramatic proof that respondents do not require a constitutional license to violate state antitrust law in order to survive and flourish.

Where application of traditional anti-trust principles to powerful, nationwide industries, such as organized sports, insurance and banking has proved too restrictive, Congress has shown itself quite willing to take action. E. g., compare: *United States v. South-Eastern Underwrit-*

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[5]R., 6201, 6302.
[6]Milwaukee Sentinel, Tuesday, December 13, 1966: Section 2, p. 1.

ers Association, 322 U. S. 533 (1944) with the McCarran Act, 15 U. S. C. §§ 1011-1015; *United States v. National Football League*, 116 F. Supp. 319 (EDPA 1953) with 15 U. S. C. sec. 1291 (Television Pooling); *United States v. DuPont & Co.*, 366 U. S. 316 (1961) with Int. Rev. Code of 1954, § 301 (f), as amended, 76 Stat. 4 (Feb. 3, 1962); *United States v. Philadelphia National Bank*, 374 U. S. 321 (1963) with the 1966 Amendment to the Bank Merger Act, 80 Stat. 7 (1966). See also the Football Merger Act, 80 Stat. 1508 (1966). If this Court sustained the application of state antitrust laws to organized baseball and they proved to be unduly burdensome, organized baseball would have resort to a receptive Congress.

But if this Court denies state antitrust jurisdiction over organized baseball, there will be no remedy for its abuses.

In light of congressional failure after *Toolson* to subject this powerful monopoly to federal anti-trust laws, one can hardly expect legislation to permit correction of the decision below and allow the states to deal with essentially local abuses such as those suffered by Wisconsin.

Only if state antitrust jurisdiction over baseball is upheld is Congress likely to respond to this Court's invitation in *Radovich v. National Football League*, 352 U. S. 445 (1957) and deal affirmatively with the inequities and other federal antitrust problems which are left by this Court's *Toolson* decision.

3. The State of Wisconsin in the petition, and the State of Illinois in its brief amicus curiae, have pointed out the decision below would confuse and hamper enforcement of the state antitrust laws, particularly with respect to or-

ganized league sports. The State of Wisconsin is now confronted by citizen complaints about organized professional football, and is in serious doubt as to whether the decision below will permit enforcement of the State's antitrust laws against that sport and whether, in all fairness, it should subject professional football to sanctions if professional baseball has been correctly held to be constitutionally immune.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Supreme Court of Wisconsin to permit full consideration of the important constitutional issues involved.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Counsel for Petitioner